Supreme Court, U.S.
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No. 03-280

In The
Supreme Court of the United States

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

SUSAN M. LEE, ESQ.
Counsel of Record
32 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
(201) 585-8310

Counsel for Respondent,
Christina H. Lee

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The Hague Convention was promulgated and designed with the noble cause to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of their habitual residence. In doing so, the Convention sought to dissuade parents from wrongfully removing children in search of a more sympathetic court.

The Hague Convention is invoked where a child is wrongfully removed or retained from its place of habitual residence. *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994). In analyzing whether the Hague Convention applies, the Court must first determine the threshold question of where is the habitual residence of the child. *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001).

The determination of a child's habitual residence is a factual determination made on a case-by-case basis. *In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted).

There is no wrongful removal to the United States if a) the parent consents to the child's removal, *Shalit v. Coppe*, 182 F.3d 1124 (9th Cir. Alaska 1999), *amended by Shalit v. Coppe*, 99 Cal. Daily Op. Service 7575, 99 D.A.R. 9629 (9th Cir. Sept. 14, 1999); *Gonzalez-Caballero v. Mena*, 251 F.3d 789 (9th Cir. Ariz. 2001) or, b) the Court finds the habitual residence of the child is the United States. *In re Application of Ponath*, 829 F. Supp. 363, 365 (D. Utah 1993) citing *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995).

Ordinarily, a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective. *Feder*, 63 F.3d at 222-24 (citing the High Court of Justice in *In re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989)); *Zuker v. Andrews*, 2 F. Supp. 2d 134 (D. Mass. 1998); *In re Ponath*, 829 F. Supp. at 365.

However, in the case of a young child, the conduct, intentions, and agreements of the parents during the time preceding the alleged abduction are important factors to be considered. There must be a degree of **settled purpose** between the parents. *Kanth v. Kanth*, 2000 U.S. App. LEXIS 27383 *4 (10th Cir. Utah 2000) (emphasis added). *See also In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted) (holding that a two-year-old child is unable to meaningfully and independently express his feelings regarding his habitual residence and has no capacity to determine such status); *Tsarbopoulos*, 176 F. Supp. 2d at 1055 ("For the newborn, Jason, and the two year old Joanna, there was understandably no acclimatization to Greece. At their ages, their world revolved around their mother, their home . . .").

STATEMENT OF FACTS[1]

Christina Lee (hereinafter, referred to interchangeably as the "Respondent" or "Christina") began a romantic relationship with Wim Delvoye (hereinafter, referred to interchangeably as the "Petitioner" or "Wim") during May 2000. From May through October 2000, Petitioner traveled to New York from Belgium to be with Christina, at least one week out of every month. During each visit, Christina stayed with Wim at the Manhattan apartment that he owns.

In August 2000, Christina moved into Wim's Manhattan apartment with all her necessary belongings, including, *inter alia*, clothing, shoes, a kitchen table and chairs, a night table, kitchen utensils, many books that she referred to regularly for her profession, jewelry, dishware, a microwave oven, a rice cooker, a television, etc. Christina considered this to be her home. Christina lived in the Manhattan apartment until her departure for Belgium in mid-November 2000.

On or about the end of September or early October 2000, Christina discovered she was pregnant with her son, Sebastian, and informed Wim. Christina immediately

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[1] Each of the foregoing facts is found in the General Appendix submitted in the Record on Appeal to the Court of Appeals for the Third Circuit. It is respectfully submitted that Petitioner's recitation of the facts, i.e., that Respondent wrongfully removed Sebastian under the "guise" of a two-week visit to the United States is contrary to the factual findings of the District Court, which were further not disputed on appeal to the Third Circuit Court of Appeals. *See* p. A-9 of Petitioner's Brief Appendix.

began prenatal care with a New York obstetrician. Christina and Wim had many discussions about whether or not to proceed with the unplanned pregnancy.

Initially, Christina and Wim agreed that Christina would remain in New York during the pregnancy with Wim traveling back and forth. Then Wim changed his mind, and began insisting that Christina temporarily come to Belgium to give birth to Sebastian because he refused to pay the medical expenses in New York. He claimed that it was more affordable in Belgium because of their socialized medical system and that one ". . . would even get money in Belgium" for having a baby there. He told Christina that if she insisted on giving birth to the baby in New York, Christina's mother would have to pay for it.

The couple discussed marriage, but Wim refused to be married in the United States, citing various reasons while falsely promising to marry Christina before the baby was born if she had the child in Belgium. As a further inducement to having the baby in Belgium, Wim agreed that New York would be a home base for the family, also promising Christina that they would look into setting up a European base in a major international city such as Paris, London, Brussels or Madrid. The couple never discussed remaining in Ghent, Belgium as a European home base. Wim also promised Christina that he would care for her and fully support her during the pregnancy. He promised Christina that they would temporarily rent a separate apartment because he admitted that his one-room loft, which also served as his office, was inappropriate for an expectant mother.

In mid-November 2000, when Christina departed for Ghent, Belgium, she was four months pregnant. Expecting to be returning to the New York apartment, she brought with her only one suitcase filled solely with maternity clothes and a handful of pregnancy and baby care books. She left all of her belongings in Wim's Manhattan apartment. Wim also had left his personal belongings at the Manhattan apartment untouched. All the furnishings, kitchenware, appliances, non-maternity clothing, books, etc. remained where they were, unchanged.

Christina traveled to Belgium on a three-month tourist visa, which eventually expired. Nothing was done to change or correct Christina's immigration status, which remained illegal throughout the remainder of her short stay in Belgium. At Sebastian's birth, and when Christina departed Belgium on July 23, 2001, she was an illegal alien. After the birth of Sebastian, on the basis of Christina's illegal immigration status in Belgium, Wim threatened to deport Christina and keep the baby. Although Wim insists that Belgium is the habitual residence of Sebastian, it is a country where the mother had no residency status or rights, whatsoever.

Upon her arrival in Ghent, Belgium and throughout the entire duration of her stay until her departure to the United States, and contrary to Wim's promises, Christina stayed in Wim's one-room loft apartment/office. Wim's one-room attic loft is situated on the fourth floor of an old industrial "walkup" factory building directly beneath the roof. The loft contained a kitchenette on one end with a lumpy sofa and hammock, and a mattress on the floor on the other end that served as the couple's bed. The majority of the living space was the office area containing an extremely long worktable. There were no dividing walls,

closets or separate living space except for the bathroom. Wim refused to lock the entrance door to the loft so that his assistants could come and go freely to work in the office. Wim also conducted business meetings with curators, dealers, collectors and the press in the loft. Christina had no privacy, whatsoever. During her entire stay in Belgium, Christina lived out of her one suitcase that was situated on the floor.

Christina did not speak Flemish, the language spoken in Ghent, nor did she ever learn the language. Christina rarely had access to Wim's automobile, and was thus subject to his control as to her local travel. Wim completely controlled the couple's finances. Christina had only one friend at the end of her stay in Belgium and on account of Wim's rages, felt scared and terrorized as if she were a prisoner.

When Christina arrived in Belgium, she slowly became ensnared in the nightmare world of Wim Delvoye, a domineering, psychologically and emotionally unstable artist known for his extreme obscenity-laden scatological abject art. Wim had lured Christina into his dark den, enticing her with false claims and promises that it was to be of limited duration. Once entrapped, he dominated and terrorized Christina by controlling every aspect of her life, keeping her isolated as he tried to break her will and sense of any worth. Christina suffered from verbal, psychological and emotional abuse. She became a constant victim of terror, intimidation, isolation, degradation and fear. A gentle and soft-spoken person, Christina suffered through Wim's frequent and unpredictable rages. He coerced Christina into submission with fearful displays of violent rages, obsessive insane jealousies, and threats against her life or the risk of losing her baby by having

Christina deported. He pounded Christina with insults, desecrating her sense of worth and self-esteem. She became a prisoner, living in a one-room loft with no walls or privacy. Indeed, Christina's only place of refuge or privacy was in the bathroom. Towards the end of her stay, and more intensely after Sebastian's birth, Christina lived in terror under Wim's raging and psychotic dominion. The whole time that Wim terrorized Christina, she was either pregnant or a frightened mother nursing a newborn.

Christina never intended to make Ghent, Belgium her permanent residence. Moreover, Christina never intended to abandon her home in Manhattan. However, Wim **unilaterally** decided that Ghent would become their home base. Wim terrorized Christina into submission. Christina always regarded the Manhattan apartment as their home. However, contrary to Wim's false promises, once Christina was in Belgium, Wim unilaterally decided to sell or rent out the Manhattan apartment against Christina's express wishes. This triggered fights between the two. Indeed, at trial, Wim admitted that Christina did not want the apartment to be sold because she considered it to be her home in New York, but that he "didn't care about that." By this admission alone, Wim admits that there was no agreement between the two as to where Christina's home would be, or at the very least that Christina's decisions were of no consequence to him.

The arguments escalated in Belgium as to Christina's and Sebastian's return to the United States. Finally, Wim told Christina to leave before he "got attached" to the baby. Christina immediately applied for Sebastian's U.S. passport at the United States Embassy. Consistent with his permission to leave, Wim signed a consent letter to obtain

the child's U.S. passport. Wim drove Christina and Sebastian to the airport, asking for several items to keep as remembrances of the child, while hysterically weeping and taking a video of the mother and child as they left. Christina and Sebastian returned to New Jersey on July 23, 2001, a time when Sebastian was just two months old, and was breastfeeding.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On February 22, 2002, Wim filed a Petition with the District Court of New Jersey for the Return of the infant child, Sebastian, to Belgium pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

In response to Wim's petition for the return of Sebastian to Belgium, on April 2, 2002, Christina filed a response and cross-motion to dismiss, pleading that the petition lacked virtually every essential element required to vest proper jurisdiction with the District Court under the Hague Convention. In her defense, Christina asserted, *inter alia*, that Belgium is NOT the habitual residence of Sebastian because there was no "settled intent" (a necessary component) to remain in Belgium indefinitely; Belgium was none other than a coerced residence; and that there was no wrongful removal or wrongful retention of the child because Wim consented to their departure. Further, in addition to her jurisdictional defenses, Respondent raised the defenses of acquiescence by the Petitioner, and grave risk of harm to Sebastian should the child be required to return to Belgium.

In its final opinion, the District Court properly ruled that the Petitioner had failed to meet his burden to prove that Belgium had been the habitual residence of Sebastian, and accordingly that there had been no wrongful removal of the infant from Belgium in the first instance. The opinion was, amongst other factors, based upon the District Court's rejection of Petitioner's "one country" argument, which postulates that where a child is born and subsequently removed, the birth country is arbitrarily its habitual residence. The District Court further held that there was no credible evidence that the stay in Belgium was ever jointly intended to be anything more than temporary. Rather, the District Court found that the overwhelming weight of the evidence was that the settled intent of the parties was to go to Belgium to bear the baby, followed shortly thereafter by a return to their home base in New York.

The Third Circuit Court of Appeals affirmed. The Third Circuit Court reaffirmed the well-established principle that there must be a degree of settled purpose and shared intentions by the parents regarding the child's habitual residence. The Court further ruled that, based on the unique set of facts to the underlying case involving a newborn child and a country where the mother was present only on a temporary basis, the child shall not be deemed a habitual resident of the country of birth.

SUMMARY ARGUMENT

The Third Circuit Court and the District Court properly applied existing case law as it relates to the determination of the habitual residence of a child prior to an

alleged wrongful removal. The analysis applied by the Courts correctly considered the "settled intent" of the parents of the child as it related to the child's residence, and the child, being two months of age, was not capable of forming any "settled intent" of its own.

In analyzing the case law, the Third Circuit Court and the District Court properly rejected Petitioner's contention that the country of one's birth is automatically the country of one's habitual residence. In this regard, the place of birth is subordinate to the expressed intentions of the parents of a newborn regarding where they and the child will reside. The intent of neither will control, rather it being the shared intent that is determinative, if a joint understanding is reached. The District Court's conclusions that Christina never had any intent of remaining in Belgium other than for the birth of her child was well-supported by the credible evidence adduced at trial, which factual findings were not disputed on appeal. As such, the fact was unequivocally established that there was no mutual settled intent to make Belgium the habitual residence of the child.

Both the Third Circuit Court and the District Court's analysis of the case through the lens of "settled intent" are wholly consistent with the precedent the Third Circuit Court set forth in its seminal opinion of *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995), along with the well-developed body of case law as decided throughout the nation.

REASONS FOR DENYING REVIEW

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS THAT BELGIUM IS NOT THE CHILD'S HABITUAL RESIDENCE IS CORRECT AND IS CONSISTENT WITH THE HAGUE CONVENTION AND WITH THE PREVAILING DECISIONS OF OTHER COURTS

A. The District Court Properly Evaluated The "Settled Intent" Of The Child's Parents Where, As Here, The Child Was Only A Two-Month-Old Infant, And, As A Matter Of Law, Cannot Have Acclimatized To Belgium By Virtue Of His Infancy

The gravamen of Petitioner's appeal is that the Third Circuit Court did not apply a "one country" analysis in determining the habitual residence of Sebastian.

While, ordinarily, a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective and the parents' present, shared intentions regarding their child's presence there, *Feder,* 63 F.3d at 222-24, the District Court properly adjusted the analysis to address the case of a young child, in this case a two-month-old neonate. As the District Court stated,

> "In the case of a newborn infant who is still nursing, it is particularly appropriate to focus on parental intentions in determining a child's habitual residence. *Cf. In re Ponath,* 829 F. Supp. 363, 367 (D. Utah 1993). A two-month old neonate simply has not been present anywhere long enough to have an acclimatization apart from his parents."

Therefore, properly applying the *Feder* rule, and consistent with prevailing case law as discussed in the Statement of Case, *supra,* the District Court focused at trial on the parents' shared intentions regarding Sebastian's presence in Belgium along with an analysis of Sebastian's circumstances there. The District Court's legal analysis and interpretation was upheld by the Third Circuit Court's affirmance.

The only contact that Sebastian had to Belgium was his birth. He remained in Belgium for only two months (one month longer than Christina would have preferred but for the fact that Wim refused to allow them to leave). By virtue of his infancy, Sebastian never acclimatized to Belgium. His entire world and existence centered around his mother.

After the completion of the two full-day plenary hearing, the Petitioner failed to produce any credible evidence that the habitual residence of Sebastian is Belgium, and proffered absolutely no credible proof that it was Christina's "settled intent" to remain in Belgium indefinitely, or to abandon New York as a habitual residence. Wim's sole basis for insisting that Belgium is Sebastian's habitual residence is because he was born there. Further, the evidence at trial clearly demonstrated that Wim was a liar and an extremely deceptive person. The evidence showed that, throughout the duration of their brief relationship, Wim freely lied to, and would say anything or act in any way to manipulate Christina.

Conversely, at trial, it was clearly demonstrated that Christina was a habitual resident of the United States, and the overwhelming evidence at trial proved that Christina never abandoned that residence. Persuaded by

Wim's insistence and false representations that he could not afford the U.S. medical costs, coupled with the false assurance that the visit to Belgium was temporary and for a limited duration, Christina traveled to Ghent, Belgium for the sole purpose of giving birth to Sebastian. At the time, Manhattan was the couple's home base. While the couple discussed other possible locations for a concurrent European home base, there was absolutely no settled intent to make Ghent, Belgium their residence, nor any settled intent to abandon their home in New York.

The District Court properly found that the substantial weight of the evidence supported a finding that Belgium was not the habitual residence of Sebastian. Any conflicting testimony by Wim that it was Christina's settled intent to relocate indefinitely to Belgium amounted to nothing more than his own unsubstantiated assertions.

The evidence showed that Christina had no mutual settled intent to make Belgium the family's habitual residence. If anything, Wim unilaterally decided that Ghent, Belgium would be the permanent home base for the family. However, Wim's unilateral decision does not, by itself, alter Christina's lack of settled intent, nor establishes Belgium as the habitual residence of Sebastian. The law is clear: one cannot unilaterally alter the settled intent of the parties. *See, Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. Cal. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001); *In re Ponath*, 829 F. Supp. 363 (D. Utah 1993). Indeed, as the *Mozes* Court stated, "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned." *Mozes*, 239 F.3d at 1079.

Wim's testimony clearly proved that any agreements, promises or representations that he made to Christina were false. Therefore, any decision or understanding that Christina had regarding the temporary nature of her visit to Belgium for the limited purpose of giving birth to Sebastian was premised on, and in reliance of, Wim's lies and false assurances. The district court's perception of the Petitioner's lack of credibility was overwhelmingly supported by the evidence adduced at trial, and such credibility determination is highly relevant and probative of the "settled intent" of the parents in determining the habitual residence of the child.

B. The Third Circuit Court's Decision Is Consistent With The Principles Set Forth In Its Seminal Decision In *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995)

The Third Circuit Court's decision is consistent with its decision in *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995). Indeed, it was the Third Circuit Court's decision in *Feder* that clearly established the doctrine of "settled purpose."

> "We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstance in that place and the **parent's present, shared intentions** regarding their child's presence there."

Feder, 63 F.3d at 224 (emphasis added).

Contrary to Petitioner's contention that the Third Circuit Court's ruling is an abrogation of its holding in *Feder*, the facts are clearly distinguishable. In *Feder*, the

family relocated to Australia because of the father's employment opportunities. While Mrs. Feder had personal reservations regarding the relocation, the evidence proved that the move was for an open-ended indefinite period of time. Indeed, the Third Circuit Court noted that the Feders listed their Pennsylvania house for sale, and sold many personal household items. *Feder*, 63 F.3d at 219. The Feders also purchased a house in Australia in their joint names. *Id.* While in Australia, Mrs. Feder extensively renovated their newly purchased home, enrolled her child into nursery and pre-enrolled her child in kindergarten for the following year. She also auditioned for a role in the Australian Opera Company, which she received. *Id.* The Third Circuit Court found that the particular set of facts in the *Feder* case indicated that at the time the Feders moved to Australia, it was "the couple's settled purpose to live as a family in the place where Mr. Feder had found work." *Id.* at 224.

Conversely, this degree of settled purpose to remain in Belgium for an indefinite period of time was completely absent in the present case. Christina went to Belgium for the expressed and limited purpose of giving birth to Sebastian based on Wim's false representations that he could not afford U.S. medical costs, and based on his false assurances that the stay would only be temporary. Further, Christina's conduct while in Belgium lacked any indicia of settled purpose as found in *Feder*. Christina lived out of one suitcase situated on the floor, she never learned the native language, Flemish, was socially isolated, and was an illegal alien with no legal status or rights. Further, unlike the Feder family, Christina left behind all her personal belongings and non-maternity clothing intact at their Manhattan apartment.

The Petitioner insists upon an extremely narrow reading and application of the Third Circuit Court's decision in *Feder*. Indeed, they have misconstrued the Court's decision as authority for establishing a "one country" rule. Such a tortured extrapolation of the *Feder* decision ignores the Third Circuit Court's ruling that the courts must also look to the shared intentions of the parents. Rather, the Petitioner suggests that habitual residence should be determined merely by looking "back" to the last country the child was present at the time of any alleged wrongful removal. Their proposed interpretation of the *Feder* decision suggests the creation of an arbitrary rule: if a child is born in a country, under any circumstance, and irrespective of the parent's shared intentions, and lives there (no matter how short a duration) prior to removal, than, that country becomes, as a matter of law, the habitual residence of the child. It's short and simple: if there is only one country involved, then that country MUST be the place of habitual residence. Common sense dictates that such a strict application of the Hague Convention would produce, in certain situations, utterly absurd results.

Indeed, it would suggest that the hypothetical posed by the District Court involving an American family that gives birth to child while vacationing in Switzerland would conclude that the habitual residence of the newborn child would vest in Switzerland.[2] Indeed, another hypothetical

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[2] At oral argument before the Third Circuit Court, the Justices posed the same hypothetical to Petitioner's counsel, who conceded that in such a case the habitual residence would be the foreign country; however, he further argued that such a hypothetical case was so rare as to be inconsequential.

would be in the case of an expectant mother, who is forcibly abducted from California into Mexico by a possessive domineering father, and, against her will, gives birth to her child on Mexican land before she flees with her child back to the United States. Applying such a stringent "one country" rule, this mother would also, potentially, be hailed back to Mexico under the Hague Convention. This is not in accordance with the Hague Convention standards. Indeed, if the birthplace of the child was the sole and dispositive criteria in determining the child's habitual residence, then the Hague Convention would have been drafted with such straightforward language. However, the Hague Convention was not written this restrictively.

The Hague Convention protects children from wrongful abduction, and returns them to the country of their habitual residence. The Hague Convention vests the power and wisdom upon the courts to make case-by-case determinations of a child's habitual residence. The courts must review the particular circumstances and facts of each case, so that it can rule judiciously and with an element of humanity.

The question is not whether a two-month-old infant must have a "habitual residence" as applied in the Hague Convention. In such rare and unusual cases such as Christina's, or the woman vacationing in Switzerland, or the expectant mother abducted to Mexico, the Hague Convention cannot be invoked to insist that the habitual residence of the newborn is the country of actual birth. In these situations, the parent must be permitted to return with the newborn to the place of their habitual residence. To insist, as Petitioner does, that such a newborn would not be afforded protection under the Hague Convention is

inaccurate. For, in the case of the family on a ski vacation in Switzerland, and whose marital residence and habitual residence is in the United States, should the mother unilaterally decide to fly directly to, and relocate to, Australia, the father would have every right under the Hague Convention to compel the return of the infant to the United States.

Indeed, the Third Circuit Court in its *Feder* decision expressly acknowledged that circumstances such as coerced residence would negate the strict "looking back" rule. In dicta, the Court stated that the facts of *In re Ponath*, 829 F. Supp. 363 (D. Utah 1983) were distinguishable from the facts laid out in *Feder*. The *Ponath* Court found a child to be the habitual resident in the United States, and not Germany, where "Petitioner's coercion of respondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany." *Id.* at 368.

The Petitioner's insistence upon the "one country" rule begs this Court to ignore the fact that Christina was lured to Belgium under false pretenses, lived out of one suitcase situated on the floor, she never learned the native language, Flemish, was socially isolated, and was an illegal alien with no legal status or rights. Further, leaving behind all her personal belongings and non-maternity clothing intact at their Manhattan apartment, Christina came to Belgium only to become imprisoned by a domineering and psychologically unstable man who terrorized her -- the whole time she was either pregnant or nursing an infant.

C. The Third Circuit Court Decision Is Not Inconsistent With *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), And Other Well-Developed Hague Convention Case Law

The Third Circuit Court's decision in the present case does not contradict nor contravene the rulings in either *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), or *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995). The facts in those cases, as in *Feder*, are clearly distinguishable. All the parents in these cases had wrongfully removed their children from countries where they, themselves, as parents had settled as families and resided for an indefinite basis. While the duration need not be permanent, it must be with the settled purpose of an indefinite duration of time.

In *Friedrich*, the Respondent mother, a U.S. citizen and member of the United States Army stationed in Germany, met and married the Petitioner father in Germany. Their only child was born in Germany. They remained in Germany as a family until the couple began to suffer marital problems. Without the father's consent or knowledge, the Respondent mother returned with the child to the United States. By this point in time, the child was already two years old. Here, unlike the present case, Mrs. Friedrich had been settled in Germany, and while she may have had future intentions of returning to the United States at some point, her presence in Germany was for an indefinite period of time.

Similarly, Petitioner's repeated reliance on *Nunez-Escudero v. Tice-Menley* is misplaced. The *Nunez* Court

rejected the mother's claim that the son's birth and seven week stay in Mexico before removal was like that of a baby born to a woman vacationing in Mexico, where the clear facts demonstrated that she had moved to Mexico on her own prior to the birth of her child, had married the child's father in Mexico, and had resided there with her husband with the shared intent to reside in Mexico for an indefinite period of time. Her presence in Mexico was never temporary or for a limited duration in time. Therefore, her claim was not supported by the particular facts of that case. Indeed, the Third Circuit Court's approach is not inconsistent with the *Nunez* decision, and the application of the "settled intent" analysis would have yielded the same result in that case. Moreover, the ruling in the *Nunez* case did not apply any "one country" theory, and is not authority for such a doctrine, as Petitioner would suggest.

Petitioner asks this Court to review the present case by applying an unreasonably narrow reading of the *Feder* decision, and to ignore the development and interpretation of the Hague Convention as applied by other federal courts. The Petitioner's heavy reliance on *Feder, Friedrich,* and *Nunez* is misplaced, and further ignores a wealth of other more relevant and factually-on-point case law. *See, e.g., Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. Cal. 2001); *Kanth v. Kanth*, 2000 U.S. App. LEXIS 27383 (10th Cir. Utah 2000); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001); *In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999); *Zuker v. Andrews*, 2 F. Supp. 2d 134 (D. Mass. 1998); *In re Ponath,* 829 F. Supp. 363 (D. Utah 1993).

The Petitioner attempts to distinguish these other highly relevant and controlling cases on the basis that they involved "a choice to be made between countries when

the *child* has lived in two different countries *prior* to the alleged wrongful removal." This construction is insupportable. Further, the Petitioner mischaracterizes the Third Circuit Court's decision as establishing a "neonate" exception. This is not the case. Both the Third Circuit Court and the District Court correctly ruled that, in cases of a newborn, because of the child's infancy, he or she could not, as a matter or law, acclimatize to any environment. As such, lower courts can only look to the shared settled intent of the parents. This approach is consistent with well-settled prevailing case law. *See In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (citations omitted) (holding that a two-year-old child is unable to meaningfully and independently express his feelings regarding his habitual residence and has no capacity to determine such status); *Tsarbopoulos*, 176 F. Supp. 2d at 1055 ("For the newborn, Jason, and the two year old Joanna, there was understandably no acclimatization to Greece. At their ages, their world revolved around their mother, their home . . ."). Therefore, in cases involving young children, the courts are required to carefully evaluate the shared intentions of the parents.

The facts of *Tsarbopoulos* are extremely compelling to Christina's case. Petitioner asserts that *Tsarbopoulos* is irrelevant because there was a choice between "two countries." This is nonsensical. Indeed, it should be noted that the child in that case was only two-months-old when he moved from the United States to Greece. This fact did not prevent the *Tsarbopoulos* Court from holding that the United States was the children's habitual residence, notwithstanding the fact that the family returned to the United States over three years later.

In *Tsarbopoulos,* the couple relocated to Greece because of the husband's employment. The evidence before the court demonstrated that the petitioner was a highly volatile man who was extremely abusive and domineering to his submissive wife. The court found that the respondent barely could speak Greek, had decreased contact with her family, was extremely fearful of her husband, was isolated and confined to the home for extended periods, had no car or used public transit, had very limited social contacts, her phone calls were screened and monitored by her husband, and that many of the family belongings remained unpacked. The court found the husband to be a jealous and accusatory man who flew into uncontrollable rages. The husband was completely dominant in all essential matters affecting the couple and their family, had complete control of finances and financial records, and refused to pay for necessary expenses, thereby forcing the wife's family to pay. The court also noted that the husband still maintained ties with the United States, by using American credit cards and bank accounts, and that he maintained his New Jersey driver's license and filed New Jersey non-resident tax returns. *Id.*

The court found that as a result, the mother "did not acclimatize to Greece." The court stated, "As a consequence, she cannot be said to have made Greece the habitual residence of her children or to have joined Dr. Tsarbopoulos in his intent to do so." *Id.* Accordingly, the *Tsarbopoulos* Court concluded as a matter of law that the Hague Convention did not apply because the parents did not share a settled intent to change the family's habitual residence from the United States to Greece. *Id.*

The facts in *Tsarbopoulos* are sadly similar to Christina's. Wim kept Christina completely isolated. She had no

car or transportation, although she maintained her New Jersey driver's license. She could not speak Flemish. She had no significant friends or immediate family. Christina was an illegal alien in Belgium. Wim did nothing to correct her status. Wim persistently and methodically attempted to alienate Christina from her family and friends by constantly deriding and criticizing them to her. Wim gave her no money except for groceries. Christina had to rely on her family for personal funds. Wim controlled all aspects of the couple's finances. He monitored her calls. He employed terrorism and intimidation to force Christina into submission. Indeed, all the facts surrounding Christina's nightmare with Wim clearly demonstrate that it was impossible for Christina to have acclimatized to Belgium. Moreover, Christina could not have made any voluntary decision under such coercion.

See also, In re Ponath, 829 F. Supp. at 368 (In evaluating the parents' present shared intentions, there must be an element of voluntariness and purposeful design.) Courts have refused to return children to a contracting state where the evidence showed coercion and abuse, which effectively eliminated the necessary quotient of voluntary free choice. *Id.* ("Petitioner's coercion of respondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany.") *See also In re Bates*, No. CA 122.89 at 10, High Court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989). ("In this case, what began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United

States with the minor child and petitioner's willful obstruction of that purpose.") In such instances, the contracting state is no more than a coerced residence. Indeed, where there has been "verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of the victimized spouse asserted to manifest 'consent' must be carefully scrutinized." *Tsarbopoulos*, 176 F. Supp. 2d 1045.

D. The Petitioner Mischaracterizes The Third Circuit Court's Ruling As Focusing On The Future Intentions Of The Parties; The District Court Reviewed The "Settled Intent" Of The Parties, And The Evidence Adduced At Trial Overwhelmingly Supported The Fact That Christina Never Intended To Abandon Her Residence In Manhattan, And Went To Belgium For A Limited Purpose Of Temporary Duration

The Petitioner mischaracterizes Christina's testimony as regarding her "future intentions." The courts have rejected recognizing future intentions of those parents who have settled for an indefinite period of time in another country, but then changed their minds. This is not the case for Christina. Her testimony does not pertain to future intentions, but rather past shared intentions that were agreed to by both Christina and Wim.

As the District Court found the overwhelming circumstantial evidence adduced at trial corroborated Christina's claim that her decision to go to Belgium was for a very limited purpose of a defined duration of time. The evidence

at trial also proved that Christina was a victim of conniving "white lies" that deceived her into believing that the shared intentions by Wim were sincere at the time.

The critical distinction between the cases is whether the presence in a particular country is temporary or has an indefinite duration. While the duration need not be permanent, it must be with the settled purpose of an indefinite duration of time. As discussed *supra,* the Third Circuit Court's decision in the present case does not contradict nor contravene the rulings in either *Feder*, *Friedrich*, or *Nunez*, which involved parents who wrongfully removed their children from countries where they, themselves, as parents had settled as families and resided for an indefinite basis.

In *Kanth,* the court held that the petitioner father had failed to show that Australia was the habitual residence of the children. In doing so, the court found the following evidence persuasive in finding that respondent mother had no settled intent to remain in Australia. The family traveled to Australia on tourist visas; the father enticed the mother to go to Australia on the false assurance that the stay would be temporary; the family left most of their household furnishings and personal belongings behind; and email messages by the petitioner father to respondent mother's parents admitting to his efforts and desire to obtain U.S. employment. *Kanth,* 79 F. Supp. 2d 1317. *See also In re Morris*, 55 F. Supp. 2d at 1162 (finding that the parties intent to return to the United States was manifested by the fact that they stored their furniture and automobile in Colorado); *David B. v. Helen O.*, 164 Misc. 2d 566, 570, 625 N.Y.S. 2d 436 (N.Y. Fam. Ct. 1995)

(finding that parent's decision to leave behind personal belongings is relevant in determining the child's habitual residence).

As repeatedly asserted above, Christina left all her personal belongings and post-maternity clothing in their Manhattan apartment. This corroborates Christina's testimony that her travels to Belgium were strictly on a temporary basis. Further, the state of Christina's Manhattan apartment demonstrates that she had no intent to abandon her Manhattan home base.

CONCLUSION

To return Sebastian to Belgium in light of the overwhelming evidence that there was no settled intent by the parents to establish Belgium as the habitual residence of the child, and that the Hague Convention does not apply to this matter, would produce an absurd result that the Convention did not intend. As the *Morris* Court stated, "This should be carefully reviewed and carefully qualified if it [is] not to lead to absurd results." *In re Morris*, *supra*, 55 F. Supp. 2d at 1162, quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 145.

It is respectfully submitted that the Petitioner's petition for writ of certiorari on the grounds that the Third Circuit Court's decision contravenes the Hague Convention and the decisions of other Circuit Courts are meritless. For the above foregoing reasons, the Respondent

respectfully requests that the petition for writ of certiorari be denied.

Dated: September 19, 2003

Respectfully submitted,

SUSAN M. LEE, ESQ.
Counsel of Record
32 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
(201) 585-8310
Counsel for Respondent,
Christina H. Lee